

**MICHAEL STRATTON,**

*Plaintiff*

**v.**

**JO ANNE B. BARNHART,**  
*Commissioner of Social Security,*

*Defendant*

***Docket No. 03-223-B-W***

severe but which did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), Finding 3, Record at 18; that the plaintiff’s statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 4, *id.*; that he lacked the residual functional capacity to lift and carry more than 20 pounds occasionally or more than 10 pounds on a regular basis, stand or walk for more than a total of two hours in an eight-hour work day, perform work not permitting a sit/stand option, climb ladders, ropes, or scaffolds, bend or twist more than occasionally, work on uneven ground, operate foot controls, work near unprotected heights, or work in cold or damp environments, Finding 5, *id.*; that he was unable to perform his past relevant work, Finding 6, *id.*; that his capacity for a full range of sedentary work was diminished by the limitations listed above, Finding 7, *id.*; that given his age (24), education (high school), work experience (semi-skilled) and residual functional capacity, he was able to make a successful vocational adjustment to work that exists in significant numbers in the national economy, including employment as an assembly worker, surveillance monitor and telemarketer, Findings 8-11, *id.* at 18-19; and that the plaintiff accordingly had not been under a disability, as that term is defined in the Social Security Act, at any time through the date of the decision, Finding 12, *id.* at 19. The Appeals Council declined to review the decision, *id.* at 5-7, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner’s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination made must

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page references to the administrative record.

be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, but the standard of review specific to that step is not implicated here; the plaintiff challenges only the administrative law judge's evaluation of his credibility, which is subject to specific regulatory standards further described in Social Security Ruling 96-7p and case law.

### **Discussion**

The plaintiff relies, Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 2, on the response of the vocational expert to a hypothetical question posed by the administrative law judge, and repeated by the plaintiff's representative, to the effect that there were no jobs that the plaintiff could perform if his testimony regarding his physical limitations and restrictions were found to be entirely credible, Record at 272-73. She testified that the plaintiff would not be able to do any of the jobs she had mentioned in response to another hypothetical question from the administrative law judge, which provides the basis for Finding 11 in the administrative law judge's opinion, if he needed an hour-long break after sitting for two hours. *Id.* at 273.

The relevant regulations are 20 C.F.R. §§ 404.1529(c) and 416.929(c), both of which use the following language:

(1) *General.* When the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain, we must then evaluate the intensity and persistence of your symptoms so that we can determine how your symptoms limit your capacity for work. In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence, including your medical history, the medical signs and laboratory findings, and statements from

you, your treating or examining physician or psychologist, or other persons about how your symptoms affect you. . . .

(2) *Consideration of objective medical evidence.* . . . We must always attempt to obtain objective medical evidence and . . . we will consider it in reaching a conclusion as to whether you are disabled. However, we will not reject your statements about the intensity and persistence of your pain or other symptoms or about the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements.

(3) *Consideration of other evidence.* Since symptoms sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, we will carefully consider any other information you may submit about your symptoms. The information that you . . . provide about your pain or other symptoms (e.g., what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. . . . Factors relevant to your symptoms, such as pain, which we will consider include:

- (i) Your daily activities;
- (ii) The location, duration, frequency, and intensity of your pain or other symptoms;
- (iii) Precipitating and aggravating factors;
- (iv) The type, dosage, effectiveness, and side effects of any medication you take or have taken to alleviate your pain or other symptoms;
- (v) Treatment, other than medication, you receive or have received for relief of your pain or other symptoms;
- (vi) Any measures you use or have used to relieve your pain or other symptoms (e.g., lying flat on your back, standing for 15 to 20 minutes every hour, sleeping on a board, etc.); and
- (vii) Other factors concerning your functional limitations and restrictions due to pain or other symptoms.

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities.* In determining the extent to which your symptoms, such as pain, affect your capacity to perform basic work activities, we consider all of the available evidence . . . . We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence . . . . Your symptoms, including pain, will be determined to diminish your capacity for basic work activities to the extent that your alleged functional

limitations and restrictions due to symptoms, such as pain, can reasonably be accepted as consistent with the objective medical evidence and other evidence.

20 C.F.R. §§ 404.1529(c), 416.929(c). The applicable Ruling provides, in relevant part, that the administrative law judge's decision "must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." Social Security Ruling 96-7p ("SSR 96-7p"), reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2004), at 134.

The plaintiff contends that his testimony that he would need a one-hour break after sitting for two hours, Record at 262-63, is "well supported by medical findings," Statement of Errors at 3-4, specifically the statement of a reviewing physician employed by the state disability determination service that the plaintiff's "injuries would attribute to his current pain," and notes of his treating physician that "reflexes were 'barely elicitable in his right knee jerk, if any, unelicitable in his ankle jerk,'" that further studies were ordered, his splint was refitted and his prescription for OxyContin, a narcotic medication, was refilled, *id.* at 3.

The administrative law judge discussed the plaintiff's credibility as follows:

The claimant's statements concerning his impairments and their impact on his ability to work are not entirely credible. Although the evidence clearly shows that Mr. Stratton's work capacity has been diminished due to his injuries, it does not support a conclusion that he is disabled from all work. In December, 2000, the claimant told his treating physician, Julie Long, M.D., that his pain was "well controlled" by medication (Exhibit 4F). Mr. Stratton failed to keep his next appointment with Dr. Long, but her notes from February, 2001 state that he was "doing quite well." Her notes from March, 2001 indicate that the claimant failed to keep a followup appointment with his physiatrist. In May, 2001, Dr. Long observed that he appeared to be "quite comfortable." His physiatrist's records from that month state the Mr. Stratton's medications were providing adequate relief of pain (Exhibit 5F). The doctor's notes also indicate that Mr. Stratton was

“essentially a single parent” of a two-year-old daughter at that time, and was also studying for the SATs. At the hearing, the claimant testified that he is independent in self-care tasks, and does all housework and shopping chores. In addition, he is currently taking three college courses, working towards an associate degree in criminal justice. The evidence that his pain is well-managed by medication, and the range of physical and mental activities he engages in, are inconsistent with a finding of disability.

Record at 15-16. Contrary to the plaintiff’s contention, Statement of Errors at 4, this discussion does set forth sufficient reasons for the administrative law judge’s decision to reject the plaintiff’s testimony concerning his need to stand for one hour after sitting for two hours.

In fact, the report of the state-agency reviewer cited by the plaintiff also states that the plaintiff is able to sit for about six hours in an eight-hour work day but “must be able to stand, stretch, move in place 1-3 min. every 1-2 hours.” Record at 235. This statement is entirely consistent with the administrative law judge’s rejection of the plaintiff’s testimony on this point. Nothing in the notes of Dr. Long on which the plaintiff relies is necessarily inconsistent with the administrative law judge’s credibility finding. In addition to her statement that the plaintiff “actually appears quite comfortable,” Dr. Long noted that her next appointment with the plaintiff would be in three months. *Id.* at 222. The administrative law judge’s opinion in this case fully complies with the applicable regulations, SSR 96-7p and applicable case law. *See Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 194-95 (1st Cir. 1987).

### **Conclusion**

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

### **NOTICE**

***A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,***

*within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 25th day of October, 2004.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

**Plaintiff**

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V.

**Defendant**

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**SOCIAL SECURITY  
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COMMISSIONER**

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